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No. 90-1778

In The
SUPREME COURT of the UNITED STATES
October Term, 1990

HARRY SINGLETARY, Secretary,
Department of Corrections, State of Florida,

Petitioner,

v.

STEPHEN TODD BOOKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Mr. Booker prays that a writ of certiorari not issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit filed on January 14, 1991, affirming the district court's judgment granting Mr. Booker's petition for writ of habeas corpus.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

Mr. Booker accepts petitioner's statement of the procedural history, with the following additions concerning the events leading to the initiation of the *Lockett/Hitchcock* claim.

Mr. Booker was sentenced to death during a period of great confusion in Florida as to the scope of permissible mitiga-

tion in capital cases.[1] All relevant trial-level proceedings in Mr. Booker's case had concluded when the Florida Supreme Court rendered its decision in *Songer v. State*, 365 So.2d 696 (Fla. 1978) (on rehearing), *cert. denied*, 441 U.S. 956 (1979), clarifying the applicability of *Lockett v. Ohio*, 438 U.S. 586 (1978), to Florida.[2] The advisory sentencing proceedings in Mr. Booker's case took place on June 19, 1978, and on that date the jury -- by a vote of 9 to 3 -- recommended death. This Court decided *Lockett v. Ohio* on July 3, 1978. The trial court sentenced Mr. Booker to death on October 16, 1978. The Florida Supreme Court rendered its opinion in *Songer v. State* on December 21, 1978.

Mr. Booker appealed his conviction and sentence to the Florida Supreme Court. In its opinion, the court noted:

> In light of *Lockett v. Ohio*, the defendant says that Florida's death penalty statute is too narrowly defined in the range of mitigating circumstances which the sentencing authority may consider. This argument was rejected by this Court in *Songer v. State*.

Booker v. State, 397 So.2d 910, 918 (Fla.) (citations omitted), *cert. denied*, 454 U.S. 957 (1981). *Lockett* also was raised in Mr. Booker's first state post-conviction motion, filed in 1982. That

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[1] The tortured history of the Florida Supreme Court's treatment of *Lockett* is traced in Justice Kogan's concurrence in *Meeks v. State*, 576 So.2d 713, 717-719 (Fla. 1991); *see also* Hertz & Weisberg, *In Mitigation of the Penalty of Death*, 69 Cal. L. Rev. 317, 351-61 (1981).

[2] The Florida Supreme Court and the Eleventh Circuit both have recognized that the relevant time period covered by *Lockett/Hitchcock* begins in December 1972, when Florida's post-*Furman* statute was enacted, and ends in December 1978, when the Florida Supreme Court decided *Songer*. *See Lucas v. State*, 490 So.2d 943, 946 (Fla. 1986) ("Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in *Songer*"); *Thompson v. Wainwright*, 787 F.2d 1447, 1457 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987).

motion was summarily denied by the state trial court and by the Florida Supreme Court; the Florida Supreme Court's opinion did not address the claim. *Booker v. State*, 413 So.2d 756 (Fla. 1982). Mr. Booker then took his *Lockett* issue to federal court, where it was rejected on the basis of the Eleventh Circuit's then-recent decision in *Ford v. Strickland*[3] -- a decision that approved the jury instructions subsequently invalidated in 1987 by this Court in *Hitchcock v. Dugger*, 481 U.S. 393 (1987).[4]

This Court decided *Hitchcock* on April 22, 1987. Mr. Booker filed his *Lockett/Hitchcock* habeas petition in the Florida Supreme Court 96 days later.[5]

B. Facts in Support of the *Lockett/Hitchcock* Claim

Petitioner is correct that every court to rule upon Mr. Booker's *Lockett/Hitchcock* claim has found that the jury in Mr. Booker's case received the same instruction condemned in *Hitchcock*. However, because petitioner minimizes the factual context of the error as well as its consequences, we offer the following counterstatement of the facts.

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[3] 696 F.2d 804 (11th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 865 (1983).

[4] *Booker v. Wainwright*, 703 F.2d 1251, 1259-60 (11th Cir.), *cert. denied*, 464 U.S. 922 (1983).

[5] Petitioner coyly mentions that this is a successive habeas corpus petition. Pet. 24. He does not mention that a Habeas Rule 9(b) bar has never been raised in this case, not in district court, the Eleventh Circuit, or this Court. As the Court reiterated recently, "when a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ." *McCleskey v. Zant*, ____ U.S. ____, 111 S. Ct. 1454, 1456 (1991).

At every stage of Mr. Booker's trial -- from the beginning of voir dire to the penalty phase jury instructions -- the advisory sentencing jury was told unequivocally that in recommending a sentence for Mr. Booker it could consider only the mitigating factors set out in Florida's capital statute. That message was hammered home by the judge, the prosecutor, and, at various stages of the proceedings, the defense counsel himself. As a consequence, although substantial nonstatutory mitigating evidence was *introduced* at Mr. Booker's trial, the jury and judge *considered* that evidence only as relevant to the statutory factors.

At the very beginning of the voir dire process, the trial judge instructed the venire that at the penalty phase the "jury makes a recommendation of what sentence the judge should pass, *based on factors the law has written down*, aggravating circumstances and *mitigating circumstances*." Tr. 37 (emphasis added).[6/]

Following the jury's finding of guilty, the judge instructed that "[a]t the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on *the factors* in aggravation and *mitigation you may consider*." Tr. 582 (emphasis added).[7/] This instruction clearly defined the limits of the jury's understanding of the evidence it would hear at the penalty phase and was reinforced by the final jury instructions, discussed below.

[6/] "Tr. ___" refers to the pages of Mr. Booker's trial transcript.

[7/] In the introductory jury instruction in *Hitchcock*, the jury was told it would be instructed "on the factors in aggravation and mitigation that you may consider under our law." *Hitchcock*, 481 U.S. at 398.

The state's penalty phase evidence consisted of certified copies of Mr. Booker's prior convictions. The defense's penalty phase evidence consisted of Mr. Booker's testimony, together with evidence adduced at the guilt/innocence phase -- principally the testimony of Dr. Carrera and Detective Price. That evidence involved almost exclusively matters not included on the statutory list.

The prosecutor's closing argument to the jury stressed that "there is a list" of aggravating and mitigating circumstances. Tr. 600-01, 611-12.[8/] In his closing argument, defense counsel conceded that only the statutory mitigating factors counted. As a consequence, he tried to fit all of the evidence into the statutory factors.[9/]

With the foregoing as context, the judge in Mr. Booker's case gave the jury substantially the identical jury instructions that this Court unanimously struck down in *Hitchcock*: "*The* mitigation circumstances which you may consider if established by the evidence, are *these*: [statutory list.]" Tr. 625 (emphasis added).[10/]

[8/] The prosecutor in *Hitchcock* "told the jury that it was to 'consider the mitigating circumstances and consider those by number' and then went down the statutory list item by item." *Id.* (citations omitted).

[9/] In *Hitchcock*, the defense attorney, while stressing the statutory mitigating factors, also told the jury it was to "look at the overall picture . . . consider everything together . . . consider the whole picture, the whole ball of wax." *Id.* (citation omitted).

[10/] Hitchcock's jury was instructed that "*[t]he* mitigating circumstances which you may consider shall be the following: [listing the statutory mitigating circumstances)". *Hitchcock*, 481 U.S. at 398 (emphasis added).

Mr. Booker's sentencers had before them at least 10 items of significant mitigating evidence that, separately or in some unfathomable combination, *reasonably* could have lead to a life sentence. None of these factors was listed in the capital statute as mitigating and therefore none was given independent mitigating weight by the sentencer. All are matters that the *Florida courts* have recognized as nonstatutory factors justifying a life sentence:

> ***Psychiatric Institutionalization.*** Mr. Booker had been hospitalized nine times for mental problems, beginning at age 13. Tr. 585-87. In Florida this is mitigating. *Medina v. State*, 466 So.2d 1046, 1050 (Fla. 1985) (hospitalization for mental problems weighed as mitigating evidence); *Perri v. State*, 441 So.2d 606, 609 (Fla. 1983) (defendant's testimony about time in "mental institutions" was sufficient to require penalty phase inquiry into whether "the mental condition of the defendant was less than insanity but more than the emotions of an average man . . . ."); *Ferguson v. State*, 417 So.2d 631, 638 (Fla. 1982) (trial judge improperly weighted mitigating history of mental disorder and hospitalization); *Stone v. State*, 378 So.2d 765, 773 (Fla. 1979), *cert. denied*, 449 U.S. 986 (1980) (institutionalization at various times until defendant was 19 or 20 years old considered in mitigation by trial judge); *LeDuc v. State*, 365 So.2d 149, 150-51 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979) (institutionalization as a youth and psychological reports of schizoid personality properly weighed in mitigation).

Paranoid Schizophrenia. There were indications, during one of Mr. Booker's psychiatric commitments, that Mr. Booker suffers from paranoid schizophrenia. Tr. 475-77. In Florida this is mitigating. *Ferry v. State*, 507 So.2d 1373, 1376 (Fla. 1987) (paranoid schizophrenia could have formed the basis of jury's life recommendation, thus rendering override improper); *Ferguson v. State*, 417 So.2d 631, 637-38 (Fla. 1982) (history of a paranoid schizophrenia and other disorders required setting aside death sentence); *Mines v. State*, 390 So.2d 332, 337 (Fla. 1980), *cert. denied*, 451 U.S. 916 (1981) (schizophrenia, paranoid type, was mental illness requiring setting aside death sentence, on proportionality grounds, notwithstanding jury's recommendation of death); *Holsworth v. State*, 522, So.2d 348 (Fla. 1988) (fact that defendant was a "borderline personality with paranoid and schizoid features" properly considered in mitigation); *Mann v. State*, 420 So.2d 578, 581 (Fla. 1982), *cert. denied*, 469 U.S. 1181 (1985) (unclear if trial court properly weighed as mitigating psychotic depression and paranoid feelings of rage; resentencing ordered).

Hallucinations. Mr. Booker suffered visual and auditory hallucinations since age six or seven. Dr. McMahon Report at 2. In Florida this is mitigating. *Moody v. State*, 418 So.2d 989, 995 (Fla. 1982), *cert. denied* 459 U.S. 1214 (1983) (nonstatutory mitigating circumstances of personality change after return from Vietnam and

defendant's belief that God spoke to him should have been considered in mitigation; death sentence vacated); *Miller v. State*, 373 So.2d 882, 885-86 (Fla. 1979) (trial judge improperly ignored mitigating factor of mental illness and hallucinations; death sentence reversed).

History of Drug and Alcohol Problems. Mr. Booker had a history of alcoholism and drug abuse, and there was evidence that he was under the influence of both at the time of the crime. Tr. 587-88; Dr. Barnard Report at 1, 3; Dr. McMahon Report at 2; Presentence Investigation Report (PSI) at 4. In Florida this is mitigating. *Holsworth v. State*, 522 So.2d 348, 358 (Fla. 1988) ("a history of drug and alcohol problems" properly considered by jury in mitigation); *Waterhouse v. Dugger*, 522 So.2d 341, 344 (Fla. 1988) ("Waterhouse proffered evidence that he suffered from alcoholism and was under the influence of alcohol [on] the night of the murder . . . . The jurors should have been allowed to consider these factors in mitigation"); *Ross v. State*, 474 So.2d 1170, 1174 (Fla. 1985) (jury override improper due in part to defendant's "drinking problems" and history of alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of crime); *Fead v. State*, 512 So.2d 176, 178 (Fla. 1987) (Florida Supreme Court has "held improper [a jury] override where, among other mitigating factors, there was some 'inconclusive evidence that [defendant] had taken drugs on the night of the murder', along with 'stronger' evidence of a drug abuse problem");

Barbera v. State, 505 So.2d 413, 414 (Fla. 1987) (intoxication and drug dependency may mitigate sentence); *Amazon v. State*, 487 So.2d 8, 13 (Fla.), *cert. denied*, 479 U.S. 914 (1986) ("history of drug abuse" one factor rendering jury override improper); *Roman v. State*, 475 So.2d 1228, 1235 (Fla. 1985), *cert. denied*, 475 U.S. 1090 (1986) (alcoholism and organic brain syndrome justified jury instruction on statutory mitigating factor of substantial mental impairment); *Huddleston v. State*, 475 So.2d 204, 206 (Fla. 1985) (history of drug abuse among factors rendering jury override improper).

Split Personality. Soon after Mr. Booker's arrest, he acted, as the Florida Supreme Court put it, in a "bizarre manner," *Booker v. Dugger*, A-40, and evidenced a split personality. Mr. Booker became glassy-eyed, chanted, clenched his teeth until they cracked, laughed uncontrollably and suddenly cried. Tr. 377-78. The arresting detective testified that in his opinion Mr. Booker was sincere, and not faking, during these events. Tr. 381. In Florida this is mitigating. *Atkins v. State*, 452 So.2d 529, 533 (Fla. 1984) (mitigating weight of personality disorder may have been affected by erroneous finding of aggravating circumstance; death sentence vacated); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983), *cert denied*, 465 U.S. 1051 (1984) (potentially mitigating evidence of schizoid personality properly weighed); *King v. State*, 436 So.2d 50, 55 (Fla. 1983), *cert. denied*, 466 U.S. 909 (1984) (defendant's

refusal to wear civilian clothes at trial, insistence that he was Black when he was actually Caucasian, and insistence on testifying at sentencing only to assert the fifth amendment privilege, were properly weighed in mitigation); *Lucas v. State*, 376 So.2d 1149, 1153-54 (Fla. 1979) (defendant's abnormal appearance and behavior on night of shooting properly weighed by jury).

Organic Brain Syndrome. There was evidence that Mr. Booker suffered from organic brian syndrome, secondary to drug use. Tr. 477. In Florida this is mitigating. *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987) (new sentencing hearing required if examinations by court-appointed psychiatrists ignored clear indications of organic brain syndrome); *Mason v. State*, 489 So.2d 734, 736-37 (Fla. 1986) (evidence of brain damage one factor requiring post-conviction evidentiary hearing on mental competency to stand trial); *Roman v. State*, 475 So.2d 1228, 1235 (Fla. 1985), *cert. denied*, 475 U.S. 1090 (1986) (alcoholism and organic brain damage justified instruction on statutory mitigating factor of substantial mental impairment); *Johnson v. State*, 442 So.2d 185, 189 (Fla. 1983), *cert. denied*, 466 U.S. 963 (1984) (trial judge adequately considered potentially mitigating effect of organic brain disorder and other factors).

Deprived and Turbulent Childhood. Mr. Booker had a turbulent childhood, with little structure, stability or supervision and with no male role model. Left to his own devices, Mr. Booker quit school at the eighth grade and

became involved in alcohol and drugs. Dr. McMahon Report at 2; PSI at 3, 4. In Florida this is mitigating. *Holsworth v. State*, 522 So.2d 348 (Fla. 1988) ("The jury could have concluded that appellant's psychological disturbance was influenced in part by his difficult childhood; childhood trauma has been recognized as a mitigating factor"); *Neary v. State*, 384 So.2d 881, 886-87 (Fla. 1980) (jury's life recommendation could reasonably have been based on fact that defendant "grew up without a father and was reared by his mother and another woman;" jury override therefore improper); *Rogers v. State*, 511 So.2d 526, 535 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988) (shock effects produced by childhood traumas may have mitigating weight); *Lara v. State*, 464 So.2d 1173, 1180 (Fla. 1985) (history of childhood abuse and difficulty of childhood considered as mitigating circumstances); *White v. State*, 446 So.2d 1031, 1036 (Fla. 1984) (suggesting that "deprived upbringing without a father" was proper consideration in mitigation); *Perry v. State*, 395 So.2d 170, 174 (Fla. 1980) (error to exclude testimony of defendant's mother in sentencing phase of trial concerning background and upbringing).

Cooperation with Police. There was evidence that Mr. Booker cooperated with the police. The police received an anonymous telephone tip that the crime had occurred; defense counsel argued in closing argument that Mr. Booker made that call. Sentencing Tr. 18. The police described Mr. Booker as "cooperative." He voluntarily

gave fingerprints and hair samples. Sentencing Tr. 19. In Florida this is mitigating. *Jordan v. State*, 478 So.2d 512, 513 (Fla. 1st Dist. Ct. App. 1985) ("defendant's cooperation with law enforcement officers can be grounds for reducing or suspending a sentence"); *cf. Banzo v. State*, 464 So.2d 620, 622 (Fla. 2nd Dist. Ct. App. 1985) ("cooperation can be grounds for reducing or suspending a sentence . . . ."); *Caruthers v. State*, 465 So.2d 496, 499 (Fla. 1985) (death sentence not appropriate where there was one valid aggravating circumstance and several nonstatutory mitigating circumstances, including voluntary confession).

Remorse. Mr. Booker asked for the death penalty. But that "death request" could well reasonably have been viewed by the jury as evidencing the sort of remorse that shows openness to rehabilitation. Defense counsel so argued. Sentencing Tr. 20, 32. In Florida this is mitigating. *Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1983) ("[a]ny convincing evidence of remorse may properly be considered in mitigation . . . ."); *Caruthers v. State*, 465 So.2d 496, 498 (Fla. 1985) (remorse among several nonstatutory mitigating circumstances making death sentence inappropriate); *White v. State*, 446 So.2d 1031, 1036 (Fla. 1984) (remorse considered by Florida Supreme Court in search of record for possible nonstatutory mitigating factors); *Magill v. State*, 386 So.2d 1188, 1190 (Fla. 1980), *cert. denied*, 450 U.S. 927

(1981) ("state of mind of a murderer during or immediately after commission of the crime may be legitimately examined for remorse").

Honorable Discharge from the Military. Mr. Booker enlisted in the Army during the Vietnam era, and he was honorably discharged. Tr. 590; Dr. Barnard Report at 2-3; PSI. In Florida this is mitigating. *Masterson v. State*, 516 So.2d 256, 258 (Fla. 1987) (fact that defendant was a wounded an honorably discharged Vietnam veteran among mitigating factors properly considered; jury override improper); *Pope v. State*, 441 So.2d 1073, 1076 (Fla. 1983) (trial court properly found defendant's honorable service in Vietnam to be mitigating).

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT *CHAPMAN v. CALIFORNIA* APPLIED TO THE CONSTITUTIONAL ERROR IN MR. BOOKER'S CAPITAL SENTENCING

Petitioner's principal thesis for review by this Court rests upon two propositions: that the Florida Supreme Court and the Eleventh Circuit apply different legal standards in deciding whether *Lockett/Hitchcock* errors are harmless, and that the Eleventh Circuit has developed no uniform standard by which to evaluate claims of harmless error in *Lockett/Hitchcock* cases. Both propositions are wrong.

A. The Undisputed Law: *Chapman v. California*

The Florida Supreme Court and the Eleventh Circuit agree that the harmless error "beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967) governs *Lockett/Hitchcock* error,[11] as it governs virtually all other varieties of constitutional error. In *Chapman* the Court held that an acknowledged constitutional error would be treated as harmless only if the party alleging harmless error can prove "beyond a reasonable doubt" that the error did not contribute to the challenged result. *Id.* at 24. *Chapman* has become the cornerstone of this Court's jurisprudence of constitutional harmless error. *E.g.*, *Rose v. Clark*, 478 U.S. 570 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *United States v. Hasting*, 461 U.S. 499 (1983); *Connecticut v. Johnson*, 460 U.S. 73, 82-83 (1983); *Milton v. Wainwright*, 407 U.S. 371, 371 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969). In *Clemmons v. Mississippi*, ___ U.S. ___, 110 S. Ct. 1441 (1990) and *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Court recognized *Chapman's* applicability to capital sentencing errors.

The Eleventh Circuit unequivocally applied the *Chapman* standard to the constitutional error in Mr. Booker's case. The court's opinion could not have been clearer: "Our analysis is focused solely on Florida's contention that the *Hitchcock* error was

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[11] Curiously, petitioner's only reference to *Chapman* is a desultory citation to the case in a footnote on the second-to-the-last page of his petition. Pet. 24 n.8. The totality of petitioner's treatment of *Chapman* consists of a single sentence: "Even if this Court should adhere to the standards set forth in *Chapman v. California*, which some panels of the Eleventh Circuit regard as controlling, petitioner would respectfully submit that the State has met its burden under this analysis." Pet. 24 n.8 (citation omitted).

harmless beyond a reasonable doubt. *See generally Chapman v. California*." A-8 (citation omitted). Chief Judge Tjoflat's special concurrence agreed that it is the "strict criterion of *Chapman v. California* which governs harmless error analysis . . . . ." A-13 (citation omitted).

The Eleventh Circuit's application of *Chapman* to the facts of Mr. Booker's case should come as no surprise. The Eleventh Circuit routinely subjects *Lockett/Hitchcock* claims to analysis under the "harmless beyond a reasonable doubt" principles of *Chapman*. In fact, every sitting Eleventh Circuit judge who has ruled on a *Lockett/Hitchcock* claim has written or joined in an opinion applying *Chapman* to those claims. *E.g., Jackson v. Dugger*, 931 F.2d 712, 716 (11th Cir. 1991) ("if the *Hitchcock* error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed") (Johnson, Edmondson & Cox, J.J.); *Aldridge v. Dugger*, 925 F.2d 1320, 1329-30 (11th Cir. 1991) (rejecting state's argument that "none of the mitigating factors would have changed the outcome of the sentencing and therefore the *Hitchcock* error should be considered harmless beyond a reasonable doubt") (Kravitch, Johnson & Clark, J.J.); *Delap v. Dugger*, 890 F.2d 285, 305 (11th Cir. 1989) ("we cannot conclude that the *Hitchcock* error in Delap's sentencing proceeding was harmless beyond a reasonable doubt," citing *Chapman*) (Fay, Vance & Anderson, J.J.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2628 (1990); *Tafero v. Dugger*, 873 F.2d 249, 252 (11th Cir. 1989) (agreeing with district court's determination that *Hitchcock* error in that case was "harmless beyond a reasonable doubt" and referring to prior cases' citation of *Chapman*) (Vance, Kravitch, & Hatchett, J.J.), *cert. denied*, 110

S. Ct. 1834 (1990); *Clark v. Dugger*, 834 F.2d 1561, 1570 (11th Cir. 1987) ("we therefore conclude that any *Hitchcock* error was harmless under *Chapman*") (Tjoflat, Vance & Kravitch, J.J.), *cert. denied*, 485 U.S. 982 (1988); *Demps v. Dugger*, 874 F.2d 1385, 1389-90 (11th Cir. 1989) (opinion of Fay, J.) ("evaluating whether [a *Lockett/Hitchcock]* error is harmless is governed by the strict *Chapman* criterion . . . [The] error must be harmless beyond a reasonable doubt"), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1834 (1990); *id.* at 1396 (Clark, J. concurring) (*Chapman* analysis not triggered because no *Lockett/Hitchcock* error demonstrated); *Jones v. Dugger*, 867 F.2d 1277, 1279 (11th Cir. 1990) (citing *Chapman* for the proposition that "if the state can prove beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation, the error is harmless and the recommendation may stand") ((Tjoflat, Johnson, & Clark, J.J.); *Magill v. Dugger*, 824 F.2d 879, 893 (11th Cir. 1987) ("several arguments have been raised by the state and the courts below that any *Lockett* error which occurred at trial was harmless beyond a reasonable doubt") (Clark & Johnson, J.J.); *Ruffin v. Dugger*, 848 F.2d 1512, 1519-20 (11th Cir. 1988), *cert. denied*, 488 U.S. 1044 (1989) (petitioner "not entitled to a new sentencing hearing if the *Lockett* error was harmless beyond a reasonable doubt") (Tjoflat, J., concurring in part and dissenting in part).

Like the Eleventh Circuit, the Florida Supreme Court applies the principles of *Chapman* to *Lockett/Hitchcock* error. Although the Florida court does not cite *Chapman* by name, the court invariably formulates the legal issue before it in terms of *Chapman*'s "harmless beyond a reasonable doubt" standard. *E.g.*,

Meeks v. Dugger, 576 So.2d 713, 716 (Fla. 1991) ("the issue to be decided [on remand] will be whether the *Hitchcock* error was harmless. In the event the court decides that the error was not harmless beyond a reasonable doubt, the sentences of death should be set aside and new sentencing proceedings conducted before separate juries"); *Way v. Dugger*, 568 So.2d 1263, 1266 (Fla. 1990) ("we are not convinced that the [*Lockett/Hitchcock*] error was harmless beyond a reasonable doubt"); *Copeland v. Dugger*, 565 So.2d 1348, 1350 (Fla. 1990) ("the state has failed to meets its burden of proving harmless [*Lockett/Hitchcock*] error beyond a reasonable doubt"); *Tafero v. State*, 561 So.2d 557, 558 (Fla. 1990) (*Hitchcock* error held "harmless beyond a reasonable doubt"); *Heiney v. Dugger*, 558 So.2d 398, 400 (Fla. 1990) ("the *Hitchcock* error involved in this case was harmless beyond a reasonable doubt"); *Clark v. State*, 533 So.2d 1144, 1146 (Fla. 1988) ("we agree with that [trial] court that any *Hitchcock* error was harmless beyond any reasonable doubt"); *Hall v.Dugger*, 531 So.2d 76, 77 (Fla. 1988) ("we find any [*Lockett/Hitchcock*] error, however, harmless beyond a reasonable doubt"); *Cooper v. Dugger*, 526 So.2d 900, 903 (Fla. 1988) ("the state has not demonstrated that the [*Lockett/Hitchcock*] error was harmless beyond a reasonable doubt or had no effect on the judge or jury"); *Tafero v. Dugger*, 520 So.2d 287, 289 (Fla. 1988) ("any *Hitchcock* error was harmless beyond a reasonable doubt"); *Waterhouse v. Dugger*, 522 So.2d 341, 334-335 (Fla. 1988) (McDonald, J. dissenting) (arguing that under the facts "any *Hitchcock* error was harmless beyond a reasonable doubt"), *cert. denied*, 488 U.S. 869 (1988); *Downs v. Dugger*, 514 So.2d 1069, 1072 (Fla. 1987) (holding *Lockett/Hitchcock* error not harmless "beyond a reasonable doubt");

Riley v. Wainwright, 517 So.2d 656, 660 (Fla. 1987) ("we cannot say beyond a reasonable doubt the [*Lockett/Hitchcock*] error was harmless"); *Hall v. State*, 541 So.2d 1125, 1128 (Fla. 1989) ("we cannot say beyond a reasonable doubt" that *Lockett/Hitchcock* error in that case was harmless); *Smith v. State*, 556 So.2d 1096 (Fla.) ("the question remaining is whether this [*Lockett/Hitchcock*] error is harmless beyond a reasonable doubt"); *cert. denied, sub nom, Smith v. Dugger*, ____ U.S. ____, 110 S. Ct. 1511 (1990); *id.* at 1097 (Barkett, J. dissenting) ("I cannot conclude beyond a reasonable doubt that the *Hitchcock v. Dugger* error was harmless"); *Demps v. State*, 514 So.2d 1092, 1094 (Fla. 1987) (record established "beyond a reasonable doubt" that *Lockett/Hitchcock* error was harmless); *id.* at 1094-95 (Kogan & Barkett, J.J., dissenting) ("To hold that an error is harmless beyond a reasonable doubt presumes that there is nothing in the record that would raise a reasonable doubt as to that conclusion"); *Mikenas v. Dugger*, 519 So.2d 601, 602 (Fla. 1988) ("we are also unable to conclude beyond a reasonable doubt that jury's sentencing recommendation tainted by *Hitchcock* error would have been subject to override").[12/]

Specifically, the Florida Supreme Court applied the principles of *Chapman* to Mr. Booker's claim of constitutional error. Petitioner acknowledged this in arguing to the Eleventh Circuit that "while the Florida Supreme Court did not cite to *Chapman* [in Mr. Booker's case], it clearly declared a belief that

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12/ In other cases, the Florida Supreme Court does not explicitly use the "beyond a reasonable doubt" language of *Chapman* but rather cites to cases that do. *E.g.*, *Steinhorst v. State*, 574 So.2d 1075, 1077 (Fla. 1991); *Demps v. Dugger*, 514 So.2d 1092, 1093 (Fla. 1987). The important point is that the Florida Supreme Court does not use language inconsistent with *Chapman*'s formulation.

the *Hitchcock* error was harmless beyond a reasonable doubt. That is all that *Chapman* requires." Supplemental Brief of Respondent/Appellant, at 8;[13] *see also* A-42 (court convinced "beyond a reasonable doubt" that error was harmless); *id.* (Kogan & Barkett, J.J. dissenting) (same legal formulation).

Thus, the Eleventh Circuit applied *Chapman* to the facts of Mr. Booker's case. So did the Florida Supreme Court. The Eleventh Circuit applies *Chapman* to *Lockett/Hitchcock* error generally. So does the Florida Supreme Court. There is no general doctrinal conflict between the two courts, and there was none in this case.

B. The Eleventh Circuit's Application of *Chapman* to *Lockett/Hitchcock* Error

Petitioner argues that it is "impossible to discern *any* consistency between all of the *Hitchcock* cases decided by the Eleventh Circuit," Pet. 13, and that the Eleventh Circuit applies different "legal standards," Pet. 14, when resolving *Lockett/Hitchcock* claims. Any superficial "inconsistency" asserted by petitioner evinces nothing more than a court *applying Chapman* to diverse factual configurations. At most the Eleventh Circuit's cases reflect the inherent challenge of applying *Chapman* in the setting of capital sentencing error.[14]

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[13] *See also* Petition for Rehearing and Suggestion for Rehearing En Banc, at 10 (arguing that error was "harmless beyond a reasonable doubt").

[14] *Cf. Satterwhite v. Texas*, 486 U.S. 249, 256-257 (1988) (applying *Chapman* to sixth amendment error in capital sentencing proceedings, but also emphasizing complexity of applying harmless error analysis to such proceedings); *see generally* Note, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. Chi. L. Rev.

Petitioner's claim of "inconsistency" is an ipse dixit: because the Eleventh Circuit has in some cases found *Lockett/ Hitchcock* error harmless and in other cases found the error harmful,[15/] petitioner concludes that the results and legal analyses of the court's cases cannot be reconciled. Pet. 12-13. But peti-

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740 (1987).

15/ Petitioner also faults the Eleventh Circuit for not discussing harmless error in four *Lockett/Hitchcock* cases. In one case cited by petitioner, the Eleventh Circuit *en banc* court found that the *Lockett/Hitchcock* error satisfied the "actual prejudice" test of *Wainwright v. Sykes*, 433 U.S. 72 (1977); it therefore would have been absurd for the court to have then engaged in a discussion of the more forgiving *Chapman* standard. *See Hargrave v. Dugger*, 832 F.2d 1528, 1533 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1071 (1989). In another case cited by petitioner, the issue of harmless error was "neither briefed" nor "alluded to" at oral argument. *See Ruffin*, 848 F.2d at 1520 (Tjoflat, J., concurring in part and dissenting in part). Nothing in the two remaining opinions suggests that the state was even arguing harmless error. The state after all did not assert harmless error in *Hitchcock* itself. 481 U.S. at 399-400; Pet. 10.

Petitioner makes a similarly misleading contention that the Eleventh Circuit is "so splintered" that in three cases -- "*Ruffin*, *Knight*, and *Demps* -- there is no true majority, in that each of the three judges has written on his own." Pet. 13. As observed above, the state did not brief or argue harmless error in *Ruffin*. *See* 848 F.2d at 1520 (Tjoflat, J., concurring in part and dissenting in part). In *Demps*, the judges were unanimous as to the relevant legal proposition: that *Chapman*'s harmless error analysis applied to *Lockett/ Hitchcock* claims. *See* 874 F.2d at 1389-90 (opinion of Fay, J.) (*Chapman* controls); *id.* at 1394 (opinion of Clark, J.) (*Chapman* analysis not triggered because no *Lockett/Hitchcock* error demonstrated); *id.* at 1394 (Johnson, J., dissenting) (would remand to district court for harmless error determination). Likewise, in *Knight v. Dugger*, 863 F.2d 705, (11th Cir. 1988), there was no disagreement as to the legal test of harmless error. Judge Roney's opinion for the court recognized that "a *Lockett* violation can be harmless" and cited for this proposition several cases that in turn relied upon *Chapman*. *Id.* at 710. Chief Judge Tjoflat wrote separately simply to address procedural default. *Id.* at 758-59. Judge Clark wrote only to "state briefly" his "reason for concluding there can be no harmless error" under the facts of that case. *Id.* at 759.

Thus, although there is some disagreement as to the results *Chapman* would yield under particular facts, there is unanimity as to its applicability.

tioner offers no discussion of the legal analyses or facts of the cases cited. Petitioner makes absolutely no attempt to show how the facts of those cases compare with the facts of this case. The mere circumstance that an error may have been harmless in one case says nothing about the effect of error in a case with an entirely different factual record.

Review of the cases cited by petitioner reveals, as discussed above, that those cases employ *Chapman* as the controlling legal standard. The Eleventh Circuit's cases bear out a common sense approach to the application of *Chapman*'s principles to *Lockett/Hitchcock* harmless error. The cases are intensely fact-specific, a reality obscured by petitioner's opaque string citations. Petitioner does not even try to show how the circumstances of other Eleventh Circuit *Lockett/Hitchcock* cases compare with the circumstances of this case. The "inconsistency" asserted by petitioner evaporates upon examination of the cases. *E.g.*, *Delap v. Dugger*, 890 F.2d 285, 304-06 (11th Cir. 1989) (error not harmless where evidence of remorse, capacity for rehabilitation, good behavior, and organic brain damage not considered), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2628 (1990); *Demps v. Dugger*, 874 F.2d 1385, 1389-91 (11th Cir. 1989) (error harmless where record revealed the non-availability of supportable mitigating evidence), ___ U.S. ____, *cert. denied*, 110 S. Ct. 1834 (1990); *Tafero v. Dugger*, 873 F.2d 249, 252 & nn.4, 5 (11th Cir. 1989) (error harmless where no significant nonstatutory mitigating evidence existed and where counsel purposely presented no nonstatutory mitigating evidence), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1834 (1990); *Jones v. Dugger*, 867 F.2d 1277, 1279-80 (11th Cir. 1989)

(error not harmless where evidence of prison rehabilitation not considered); *Clark v. Dugger*, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (error harmless where trial counsel made strategic decision not to introduce any mitigating evidence), *cert. denied*, 485 U.S. 982 (1988); *Magill v. Dugger*, 824 F.2d 879, 893-95 (11th Cir. 1987) (error not harmless where evidence of remorse excluded).

The point is that the prevailing law -- *Chapman v. California*'s standard -- is being applied in all of these cases, as it was applied in Mr. Booker's case. The mere fact that error may have been harmless in one case says nothing about the effect of error in a different case with a different array of factual circumstances.[16/]

II. THE ELEVENTH CIRCUIT'S APPLICATION OF *CHAPMAN v. CALIFORNIA* TO THE FACTS OF THIS CASE COMPLIED WITH APPLICABLE FEDERAL AND STATE LAW

A. The Eleventh Circuit Based Its Decision on the Evidence Actually Presented at Sentencing

Petitioner speculates that the "*Booker* panel found that if any mitigating evidence *could* exist, at any point in time, a *Hitchcock* error could never be harmless." Pet. 17 (emphasis in

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16/ We note also that even if petitioner is correct that the Eleventh Circuit cases are not entirely consistent, his argument is unavailing. Ordinarily a conflict between decisions rendered by different panels of the same Court of Appeals is not a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974); *cf.* U.S. Sup. Ct. Rule 10.1. As Justice Harlan once wrote, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Harlan, *Manning the Dikes*, 13 Rec. N.Y. Bar Assn. 541, 552 (1958). Such differences ordinarily are to be settled through an en banc sitting of the court of appeals or, as Justice Harlan suggested, through "later panels customarily deferring to the decisions of earlier panels." *Id.*

original). Seizing on footnote 3 of the Eleventh Circuit's opinion, petitioner argues that the "panel below has awarded relief simply due to the existence of this evidence, although such was *never* presented to the judge and jury in this case." *Id.* The Eleventh Circuit did no such thing.

The Eleventh Circuit's opinion makes clear that its holding was based on evidence *actually presented* to the sentencers:

> In petitioner's case it is clear beyond cavil that significant nonstatutory mitigating factors were excluded from the jury's consideration by the erroneous jury charge. Booker was the only defense witness at the sentencing phase of the trial, and he testified that he had been hospitalized for psychiatric reasons nine times beginning at age 13, that he had severe problems with alcohol and drugs and had experienced blackouts, and that he was honorably discharged from the Army. He said he could not remember the crime, but that if he did it he felt remorseful. He also stated, against counsel's advice, that someone who had committed this type of crime should receive the death penalty. Although no psychiatric testimony was presented during sentencing, Booker did call one psychiatrist during the guilt phase of his trial; the testimony adduced showed that, although Booker was not insane, his records from Walter Reed Army Medical Center indicated that Booker suffered from an organic brain disorder as a result of drug use. The psychiatrist also testified that there were indications of paranoid schizophrenia. The police officer who took Booker's confession testified that Booker seemed to have a split personality when he confessed. Booker assumed the identity of "Aniel"; he said that "Steve" committed the murder; he clenched his teeth so hard they cracked; and he laughed and cried uncontrollably. The officer stated that he did not think Booker was faking.[17/] There was also evidence that Booker was cooperative with the

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17/ As the Eleventh Circuit acknowledged, the trial court judge found that this evidence was self-serving.

> police, and that he may have made the anonymous phone call reporting the murder.
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> After the jury recommended death by a 9-to-3 vote, the trial judge was presented with other evidence prior to passing sentence. This evidence included the report of a court-appointed psychiatrist. This report concluded that Booker had above normal intelligence but was impulsive and had difficulty postponing gratification. It also noted that Booker had had little supervision as a child, that he began drinking and using drugs as a teenager, and that he had experienced hallucinations. The psychiatrist concluded that Booker was not under extreme emotional duress or the domination of another at the time of the crime. But due in part to intoxicants he had consumed, Booker was "most probably . . . less able than the average individual to conform his conduct to the requirements of the law."

A-9-10.

Following this careful discussion of the evidence presented at Mr. Booker's sentencing proceeding, the court concluded: "Thus there was available nonstatutory mitigating evidence that was not considered by the sentencing jury or judge due to the *Hitchcock* violation." A-11. Only then did the court add footnote 3, which observed that "*in addition* to the evidence that was presented but not considered, evidence existed that could have been submitted to the sentencing phase if counsel had not believed that the law limited him to the statutory mitigating circumstances." *Id.* (emphasis added).

In context, the footnoted material was not relevant to the court's holding that the constitutional error in this case was

not harmless. The court's holding hinged only on the non-statutory mitigating evidence actually presented at trial--the substantial evidence presented at trial.[18]

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[18] The court's footnote may seem somewhat mysterious, until one considers *Meeks v. State*, 576 So.2d 713 (Fla. 1991).

The *Meeks* decision was in response to a state petition for rehearing. The original *Meeks* decision was reported in the advance sheets at 548 So.2d 184 (Fla. 1989). It was not placed in the bound volume because of the pending rehearing petition.

In the first *Meeks* decision, the court ordered resentencing, finding that the *Lockett/Hitchcock* error was not harmless because of the existence of non-record, non-statutory mitigation.

On rehearing, the *Meeks* court held that in determining whether the *Lockett/Hitchcock* error was harmless, post-conviction counsel can supplement the record by pointing to additional non-statutory mitigation that was available but never introduced if trial counsel believed he was precluded from introducing that information. Justice Kogan's concurring opinion in *Meeks* sets out in some detail why trial counsel might well have felt precluded from introducing non-statutory mitigation. 576 So.2d at 717-19.

After *Meeks* there are two ways to show that *Lockett/Hitchcock* error was not harmless. First, such a showing can be made by pointing to the non-statutory mitigation that, notwithstanding the *Lockett/Hitchcock* error, made its way into the record. Second, a petitioner can rely on non-statutory mitigation that was never introduced by trial counsel if he can show that trial counsel felt precluded from presenting this information.

The footnote in the opinion below addresses situations where little nonstatutory evidence was presented due to counsel's "constraint[] by the then-prevailing statutory construction." *Meeks*, 576 So.2d at 716. Unlike *Meeks*, however, no remand was necessary here. Despite the limitation, trial counsel was able to introduce substantial nonstatutory mitigating evidence which formed the bases of the Eleventh Circuit's harmless error reasoning.

B. *Lockett/Hitchcock* Error Pervaded Mr. Booker's Sentencing Procedure From Beginning to End, and the Eleventh Circuit Correctly Considered the Importance of the Jury's Sentencing "Recommendation" in Evaluating the Harmfulness of the Error

Petitioner asserts that the Eleventh Circuit ignored the role of the trial judge as final sentencer and placed undue emphasis on the importance of the jury's 9-3 sentencing recommendation of death. First, petitioner misunderstands the record: Both the district court and the court of appeals found that the sentencing judge, like the jury, was tainted by *Lockett/Hitchcock* error. Second, petitioner misunderstands Florida law: jury error alone requires resentencing given the critical importance of the sentencing jury in Florida's sentencing scheme -- a fact recognized by the Florida Supreme Court in the *Lockett/Hitchcock* and other contexts.

1. The Record: The Sentencing Judge's Own Limitation

Both the district court and the Eleventh Circuit correctly considered the role of the trial judge in Mr. Booker's case, and both courts found that the trial judge was as limited as the jury. The district court found that it was "clear from the record that the [trial] judge did not independently consider all of the evidence. Instead, the judge considered the evidence only to determine whether it established a particularly statutory mitigating factor." A-34. The Eleventh Circuit affirmed this specific finding of the district court. A-7.

The district court and Eleventh Circuit accurately read the record in this case. The *Lockett/Hitchcock* limitation at the

jury stage of Mr. Booker's sentencing proceeding is beyond dispute. As the case moved into the judge-sentencing phase, the court, defense attorney, and prosecutor continued to focus on the statutory mitigating circumstances -- as they had previously.[19] During this phase, the court received the report of Dr. Elizabeth McMahon, in which Dr. McMahon had concluded that Mr. Booker may well have been operating with diminished mental capacity -- albeit not diminished to the point of establishing any *statutory* mitigating circumstances -- at the time of the crime. Dr. McMahon could not say, however, that the impairment was *substantial* or *extreme*, as is required by the qualifying language of the statutory mitigating circumstances.[20]

In commenting on Dr. McMahon's report, the judge observed that it fell short of concluding that Mr. Booker's mental condition

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[19] The court's jury instructions -- which undisputedly violated *Lockett/Hitchcock* -- are significant here because in Florida a judge is presumed to follow the instructions he gives to the jury. The Florida Supreme Court has held that if the record does not reflect an affirmative statement to the contrary, "it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed." *Zeigler v. Dugger*, 524 So.2d 419, 420 (Fla. 1988); *accord Morgan v. State*, 515 So.2d 975, 976 (Fla.), *cert. denied*, 486 U.S. 1036 (1987); *Foster v. State*, 518 So.2d 901, 902 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Johnson v. Dugger*, 520 So.2d 565, 566 (Fla. 1988); *Daugherty v. Dugger*, 839 F.2d 1426, 1432 (11th Cir.), *cert. denied*, 488 U.S. 871 (1988); compare *Parker*, ___ U.S. ___, 111 S. Ct. at 738 (where jury was instructed in accordance with *Lockett/Hitchcock*, Court concluded that trial judge found nonstatutory mitigating circumstance: "We assume the judge applied the same standard himself" as he had instructed the jury).

[20] The statute then, as now, listed the two "mental" mitigating circumstances: that the "capital felony was committed while the defendant was under the influence of *extreme* mental or emotional disturbance," and that the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was *substantially* impaired." Fla. Stat. § 921.141(6)(b), (f) (Supp. 1990) (emphasis added).

constituted *substantial* impairment or *extreme* duress, as required by the statutory mitigating circumstances. Sentencing Transcript at 11. The prosecutor pounded this point in his closing argument. Sentencing Transcript at 36.

Like his closing argument, defense counsel's sentencing memorandum to the judge seemed to concede that the mitigating evidence in the record was relevant only to the statutory mitigating factors. Defense counsel focused on nonstatutory mitigating factors, which he attempted to "shoehorn" into the statutory language.

As the district court and the Eleventh Circuit found, the sentencing judge's final judgment and sentence provides strong evidence that he limited his consideration to the statutory factors. The sentencing order considered and analyzed only the enumerated statutory mitigating circumstances. Mr. Booker's evidence was considered as relevant only to the statutory factors. With respect to the two statutory mental mitigating factors, the court's sentencing order stated that "there was argument of counsel, but no evidence whatever of extreme emotional disturbance during the commission of the murder." *Booker*, 397 So.2d at 916. The sentencing order made no other reference to the evidence of mental impairment offered by Mr. Booker in mitigation. Record on Appeal at 142-44, *Booker v. State*, 397 So.2d 910 (Fla. 1981).[21/] Given

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[21/] In *Morgan v. State*, 515 So.2d 975, 976 (Fla. 1987) the court emphasized that the trial court, "in its order sentencing appellant to death, examined the list of statutory mitigating circumstances. Nowhere in his order is there any reference to any nonstatutory mitigating evidence proffered by the appellant." *Compare Hitchcock*, 481 U.S. at 398 ("the sentencing judge found that 'there

the quantity of that evidence, the sentencing order permits no other conclusion but that the judge considered only the statutory factors.

2. The Jury's Role in Florida's Capital Sentencing Scheme

Even if Mr. Booker had received a constitutional sentencing proceeding, petitioner contends that the trial judge would have imposed death regardless of the jury's recommendation, and that the Florida Supreme Court would have affirmed that sentence. This retro-speculation would deny Mr. Booker the individualized sentencing to which he is constitutionally entitled.[22/]

Petitioner's argument rests on a bedrock misunderstanding of the role played by the capital sentencing jury in Florida. Emblematic of petitioner's confusion is his citation of *Parker v. Dugger*, 111 S. Ct. 731 (1991) for the proposition that "the judge is the sentencer in Florida for all purposes." Pet. 18. To the contrary, in *Parker* the Court reaffirmed its consistent and accurate understanding that "under Florida law, a sentencing judge is to override a jury's recommendation of life imprisonment only when

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[were] insufficient mitigating circumstances as enumerated in Florida statutes 921.141(6) to outweigh the aggravating circumstances'").

22/ As Chief Judge Tjoflat stated in his concuring opinion, A-26:

> I cannot concieve of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

'virtually no reasonable person could differ'." *Parker*, 111 S. Ct. at ___ (quoting *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975)); *id.* at ___ (again citing *Tedder* for same proposition); *id.* at ___ (same). "We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the 'crucial protection' afforded by such review in jury override cases." *Parker*, 111 S. Ct. at ___ (quoting *Dobbert v. Florida*, 432 U.S. 282, 295 (1977) and citing *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) and *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)).[23]

Parker is only this Court's most recent recognition that central to the right to individualized sentencing in Florida is the right to a jury's "recommended" capital sentence. We put "recommended" in quotes because in reality a "recommendation" of life imprisonment by a majority of the jury[24] is tantamount to a binding verdict of life imprisonment rather than death. Although Florida judges can, and sometimes do, override jury recommendations of life, this Court is absolutely correct that a death sentence imposed following a jury's recommendation of life imprisonment will

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[23] Petitioner's criticism that the Eleventh Circuit "ignored" *Parker*, Pet. 19, is mysterious. *Parker* altered neither this Court's nor the Eleventh Circuit's understanding of Florida law; indeed *Parker* explicitly reaffirmed the primacy of *Tedder*. *See Parker*, ___ U.S. ___, 111 S. Ct. at 738. Further, since *Parker* was decided a week after the Eleventh Circuit issued its opinion in Mr. Booker's case, and since petitioner misrepresented *Parker* in his suggestion for rehearing en banc in the same way that he does here, the Eleventh Circuit can hardly be charged with "ignoring" *Parker*.

[24] Although Florida's capital statute speaks in terms of a recommendation by a "majority" of the jury, Fla. Stat. § 921.141(2) (Supp. 1991), a split vote of 6-6 is treated as a recommendation of life imprisonment. *See Patten v. State*, 467 So.2d 976, 980 (Fla. 1985); *Rose v. State*, 425 So.2d 521, 525 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983).

be sustained only if the "facts suggesting a sentence of death . . . [are so] clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 at 910. That the Florida Supreme Court meant what it said in *Tedder* is amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life.[25] *Tedder* mandates reversal if any meaningful mitigating evidence -- statutory or nonstatutory -- was presented at trial.

Florida's *Tedder* standard of review -- nowhere cited or alluded to in the petition -- is applied vigorously by the Florida Supreme Court. Between 1975 and 1984, during the time that Mr. Booker's direct appeal reached the Florida Supreme Court, that court was reversing between two-thirds and three-quarters of all life overrides reviewed by the court; these cases were remanded for imposition of life sentences, resentencings, or retrials. *See* Radelet, *Rejecting the Jury*, 18 U.C.D. L. Rev. 1409, 1422 (1985). Again unlike petitioner who fails to acknowledge that *Tedder* even exists, the Florida Supreme Court has recognized that the *Tedder* standard remains rigorous. The court in 1989 reiterated that "during 1986 and 1987 we have affirmed overrides in 2 of 11 cases, less than 20%." *Cochran v. State*, 547 So.2d 928, 933 (Fla. 1989). This "current reversal rate of over 80% is a strong indicator to

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[25] *E.g.*, *Wasko v. State*, 505 So.2d 1314, 1318 (Fla. 1987); *Brookings v. State*, 495 So.2d 135, 142-43 (Fla. 1986); *McCampbell v. State*, 421 So.2d 1072, 1075-76 (Fla. 1982); *Goodwin v. State*, 405 So.2d 170, 172 (Fla. 1981); *Odom v. State*, 403 So.2d 936, 942-43 (Fla. 1981), *cert. denied*, 456 U.S. 925 (1982); *Neary v. State*, 384 So.2d 881, 885-88 (Fla. 1980); *Malloy v. State*, 382 So.2d 1190, 1193 (Fla. 1979); *Shue v. State*, 366 So.2d 387, 390-91 (Fla. 1978); *McCaskill v. State*, 344 So.2d 1276, 1280 (Fla. 1977); *Thompson v. State*, 328 So.2d 1, 5 (Fla. 1976).

[trial] judges that they should place less reliance on their independent weighing of aggravation and mitigation." *Id.*[26]

Nonarbitrary application of *Tedder* to Mr. Booker's case would mean that a jury's life recommendation could not legitimately be subject to judicial override. As the Florida Supreme Court dissenters in this case emphasized, the substantial mitigating circumstances presented to Mr. Booker's 1978 jury would have rendered a life recommendation entirely reasonable, A-43; even with the *Lockett/Hitchcock* limitation, the vote for death was only 9-3.[27]

The Florida Supreme Court leaves no doubt that "the standards imposed by *Lockett* bind both the judge and the jury under our law . . . . If the jury's recommendation, upon which the judge

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[26] The pattern remains unchanged. In 1989 the Florida Supreme Court granted relief in five of six jury override cases on direct appeal. *See, Pentecoast v. State*, 545 So.2d 861 (Fla. 1989); *Freeman v. State*, 547 So.2d 125 (Fla. 1989); *Cochran v. State*, 547 So.2d 928 (Fla. 1989); *Fuente v. State*, 549 So.2d 652 (Fla. 1989); *Christian v. State*, 550 So.2d 450 (Fla. 1989); *Thompson v. State*, 553 So.2d 153 (Fla. 1989). In 1990, the court granted relief in all five jury override cases it decided on direct appeal. *See, Morris v. State*, 557 So.2d 27 (Fla. 1990); *Hallman v. State*, 560 So.2d 223 (Fla. 1990); *Carter v. State*, 560 So.2d 1166 (Fla. 1990); *Cheshire v. State*, 568 So.2d 908 (Fla. 1990); *Buford v. State*, ___ So.2d ___ (Fla. 1990). In 1991, though July 3, the court granted relief in six of the seven jury override cases it considered on direct appeal. *See, Dolinsky v. State*, 576 So.2d 271 (Fla. 1991; *Douglas v. State*, 575 So.2d 165 (Fla. 1991); *Hegwood v. State*, 575 So.2d 170 (Fla. 1991); *Downs v. State*, 574 So.2d 1095 (Fla. 1991); *McCrae v. State*, ___ So.2d ___, 16 Fla. L. Week, S. 421 (Fla. May 30, 1991; and *Coper v. State*, ___ So.2d ___, 16 Fla. L. Week, S. 375 (Fla. May 9, 1991).

[27] In a case where the sentencing jury's vote was 7-5, the Florida Supreme Court held *the Lockett/Hitchcock* error not harmless "in light of the close nature of the jury recommendation vote. It is significant that the difference of one vote rendered the jury recommendation one of death rather than mercy." *Morgan v. State*, 515 So.2d 975, 976 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988). In Mr. Booker's case the change in three votes of twelve would have been equally significant.

must rely, results from an unconstitutional procedure, the entire sentencing process necessarily is tainted by the procedure." *Riley v. Wainwright*, 517 So.2d 656, 659 (Fla. 1987).[28] *See also Hall v. State*, 541 So.2d 1125, 1128 (Fla. 1989) (It "is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have had a reasonable basis for that recommendation; *Waterhouse v. State*, 522 So.2d, 348, 354 (Fla. 1988); *see also, Cooper v. Dugger*, 526 So.2d 900 (Fla. 1988); *Foster v. State*, 518 So.2d 901 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Mikenas v. Dugger*, 519 So.2d 601 (Fla. 1988); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1988); *Zeigler v. Dugger*, 524 So.2d 419 (Fla. 1988); *Morgan v. State*, 515 So.2d 975, *cert. denied*, 486 U.S. 1036 (1988).[29]

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[28] *Accord Jones v. Dugger*, 867 F.2d 1277, 1280 (11th Cir. 1989) (trial court cannot, by specifically considering nonstatutory mitigating circumstances, cleanse a jury recommendation which was tainted by *Lockett/Hitchcock* error; error can be cured only by a sentencing proceeding before a new sentencing jury); *Magill v. Dugger*, 824 F.2d 879, 893 (11th Cir. 1987) ("whether or not the trial court believed it could consider nonstatutory mitigating circumstances, Magill's sentence must be vacated because the *jury* was led to believe its inquiry was so limited" (emphasis added).

[29] Indeed, when the Florida Supreme Court finds any harmful jury sentencing error it vacates the death sentence and orders a new jury sentencing trial. As Eleventh Circuit Chief Judge Tjoflat stated for the en banc court in *Mann v. Dugger*:

> [The Florida] Supreme Court will vacate the [death] sentence and order resentencing before a new jury if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, or was subject to improper argument by the prosecutor. The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. In these cases, the supreme court frequently focuses on how the error may have

The Supreme Court of Florida thus has recognized that a jury recommendation of death has a *sui generis* impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside trial level sentencing error. It is not surprising that the Florida Supreme Court would make this kind of normative judgment. A jury recommendation is, after all, the final stage in an elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence. The process begins with the legislature, which broadly defines the class of cases for which capital punishment is appropriate. Then, in the particular case, the prosecutor -- who is electorally accountable to the community -- makes the decision whether to request the death penalty. Finally, the jury, traditionally depicted as the conscience of the community, makes a judgment about the appropriateness of death in light of aggravating and mitigating circumstances. Thus, by the time the case comes before the judge for the actual imposition of sentence, it has already been filtered through three levels of community sentiment, each level less porous than the preceding one.[30]

> affected the jury's recommendation . . . . Finally, we note that the Supreme Court of Florida has ordered resentencing in cases where the trial court excused a prospective juror in violation of *Witherspoon v. Illinois*.

844 F.2d 1446, 1452-53 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989) (citations omitted).

[30] The mischief in the approach advanced by petitioner is easily illustrated. Suppose that, at the conclusion of the presentation of evidence in Mr. Booker's sentencing hearing, the trial judge discharged the jurors without submitting the issue of penalty for their consideration, saying that he had decided to impose a death sentence no matter what the jury did, and that he was, therefore, not disposed to waste their time deliberating. Such a procedure

C. It is Not the Role of the Federal Courts to Reweigh Aggravating and Mitigating Circumstances in the Guise of Conducting Harmless Error Analysis

"What petitioner has consistently argued is that the *Hitchcock* error in this case was harmless due to the *weight* of the aggravating circumstances." Pet. 21 (emphasis in original). Petitioner faults the Eleventh Circuit for not balancing the asserted aggravating circumstances against the presented mitigating circumstances -- in other words, for not assuming the role of Florida capital sentencer. Wearing the mask of comity, petitioner paradoxically urges on the federal judiciary a role singularly destructive of comity.

In *Clemons v. Mississippi*, ___ U.S. ___, 110 S. Ct. 1441 (1990) the Court held that *state* appellate courts *may* independently

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clearly would be reversible error, even if the factual record in the case was such that the trial judge could have overridden a jury recommendation of life imprisonment and survived review by Florida's *Tedder* standard governing jury overrides. This is so because the protection afforded by *Tedder* depends in no small part upon the trial judge who elects to override a jury making a considered decision to do so, and upon the Florida Supreme Court's reviewing his decision with knowledge that he has done so. Judges are not free to decide, without considering factors -- like a jury recommendation of life -- that are expected to inform their judgment, that these factors can make no difference to them. *Cf. Herring v. New York*, 422 U.S. 853 (1975). In this case, the hypothetical would require the additional assumption that the judge also refused to consider any facts in mitigation on the same ground that nothing Mr. Booker presented in mitigation would make any difference.

But that is no worse than what petitioner would have the Florida Supreme Court do in sustaining a death sentence by holding a *Lockett/Hitchcock* error "harmless" although the defendant was deprived of a jury recommendation that might have been made in his favor. Indeed such a ruling would be worse, because the Florida Supreme Court would have *no basis* other than speculation for supposing that the trial judge *would* have disregarded a jury's recommendation for life; and of course a sentence of life imprisonment imposed by a trial judge could not be increased to death by the Florida Supreme Court on appeal, even if that court thought death was warranted.

weigh aggravating and mitigating circumstances and thereby cure errors occurring at trial. The Court then remanded *Clemons* to the Mississippi Supreme Court, for the *state* court to conduct such reweighing if it chose. Implicit in *Clemons* is that federal courts do not reweigh; they do not resentence.

Neither does the Florida Supreme Court. This Court recognized in *Parker v. Dugger* that "the Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." *Parker*, ___ U.S. ___, 111 S. Ct. at 738 (citing *Hudson v. State*, 538 So.2d 829, 831 (Fla. 1989) *and Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981)). Petitioner does not suggest otherwise. The Florida Supreme Court certainly did not do so in Mr. Booker's case.[31/]

It would be an ironic reversal of the logic of federalism for the federal courts to assume an appellate reweighing function not even engaged in by the Florida Supreme Court. It would be an "inappropriate function for a federal court to weigh nonstatutory mitigating evidence against aggravating circumstances and decide whether a petitioner should get the death penalty as an alternative to a resentencing hearing. That is an invasion of the separate states' rights and obligations for their courts to insure appropriate sentencing in death penalty cases." *Demps*, 874 F.2d at 1396 (Clark, J., concurring). Nothing in law or prudence counsels the federal judiciary to take on so intrusive a role.

[31/] Chief Judge Tjoflat's special concurrence, which posited that the Florida Supreme Court *could* in theory assume the mantle of resentencer, demonstrates that in Mr. Booker's case the court did not in fact do so. A-25-28.

CONCLUSION

The writ ought not issue.

Respectfully submitted,

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